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IN THE SUPREME COURT OF FIJI
Civil Jurisdiction
Civil Action No. 26(A) of 1984

IN THE MATTER OF INVESTMENT CORPORATION OF FIJI LIMITED

and

IN THE MATTER of the Companies Act, Cap.216.

BETWEEN: INVESTMENT CORPORATION OF FIJI LIMITED
Applicant

and

OFFSHORE OIL N.L.
Respondent

J.P. Hamilton QC., M. Benefield and D.C. Maharaj for the Applicant
P.M. Jacobson and Ramesh Patel for the Respondent
Miss P. Jalal for Official Receiver

DECISION

A Winding Up Petition was presented by Offshore Oil N.L. (Offshore), the respondent to these proceedings, against Investment Corporation of Fiji Limited (ICF), the applicant herein, on the 26th July 1984. On the 14th August the Court of Appeal made an order staying further prosecution of the Petition on the grounds that there is pending an appeal to the Privy Council by ICF against the judgment of the Court of Appeal dated 25th July. That judgment in effect declared that ICF was immediately indebted to Offshore in an amount of approximately $800,000.

On the 15th August, Offshore applied for the appointment of the Official Receiver as interim liquidator of ICF. That application which was opposed was heard by me on the 19th September. On the 1st October I made orders appointing the Official Receiver, interim liquidator and defining and limiting his powers. The order was perfected on the 19th October.

According to the unchallenged evidence of Mr. Martin Tosio a director of ICF, a meeting of the directors, which he attended,

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was held in Sydney either on the 8th or 9th October. Also present at this meeting were Mr. Boris Ganke and a Miss Bianchi. Contact was made by telephone with another director Mr. Kristalis. The directors had before them a copy of my decision of the 1st October. It was resolved to make an application to this Court to have the order of the 1st October rescinded or varied. According to Mr. Tosio, the aim of the resolution was to avoid the necessity to taking the matter on appeal.

The present application (as amended) prays that the order made on the 1st October 1984 "be vacated, discharged varied or alternatively further limit the powers of the provisional liquidator or restraining him from exercising all or some of the same or to give directions as to his exercise thereof ...."(sic).

It is a general principle, which has existed since the passing of the Judicature Act 1873, that a Judge has no right to rehear an application in any form (Oxley v. Link 1914 2KB 734 per Vaughan Williams L.J. at 738). However, in the case of interlocutory orders, even when made by consent, a court retains a general control. As Jessel, M.R. said in Mullins v. Howell 11 Ch.D 763 at 766

> "I have no doubt that the Court has jurisdiction to discharge an order made on motion by consent when it is proved to have been made under a mistake, though that mistake was on one side only, the Court having a sort of general control over orders made on interlocutory applications".

A modern instance of the principle is to be found in Chanel Ltd. v. F W Woolworth & Co (1981) 1 All ER 745 in which Buckley LJ said at 751

> "Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter".

In Adam P Brown Male Fashions Ltd v. Philip Morris Incorporated the High Court of Australia in its Judgment said at 177.

> "Considerable argument was directed to the question whether a court has power, otherwise than in the case of mistake operative at the time of giving it to release a party from an undertaking, at least in the absence of the consent of the other party. But in our opinion a court undoubtedly has such a power. Just as an

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interlocutory injunction continues "until further order", so must an interlocutory order based on an undertaking. A court must remain in control of its interlocutory orders. A further order will be appropriate whenever inter alia, new facts come into existence or are discovered which render its enforcement unjust: cf Woods v. Sheriff of Queens land (1895) A.L.J. 163, at p. 165; Hutchinson v. Nominal Defendant (1972) 1 N.S.W.L.R. 443, at p. 447 Chanel Ltd F.W. Woolworth & Co. Ltd. (1981) 1 W.L.R. 485 at p. 492 (1981) 1 All E.R. 745, at p. 751. Of course, the changed circumstances must be established by evidence: Cutler Wandsworth Stadium Ltd. (1945) 1 All E.R. 103"

I am therefore satisfied that I have power to entertain an application to discharge or vary the order made on the 1st October, but, I can only do this if ICF establishes

a) that there has been some significant change in circumstances or

b) that it has become aware of facts which it could not reasonably have known or found out before the hearing of the earlier application.

In the course of my earlier decision I commented upon the failure of ICF to produce audited accounts for the year ended 31st December 1983. The applicant has now produced these accounts, audited by Messrs Coopers & Lybrand. In addition it has exhibited the accounts of its subsidiary Votualailai Ltd (Votualailai) up to 31st December 1983 audited by Messrs Price Waterhouse and half yearly, but unaudited, accounts of Votualailai up to the 30th June 1984 and a balance sheet as at 30th September prepared by Mr. Tosio. It is submitted that this new material was not available at the hearing of the original application and that it discloses new circumstances upon which this Court should now review its earlier decision.

In addition to the above, information has been placed before the court as to the detrimental effect on the business of Votualailai of the direction that the Official Receiver, register himself as shareholder in that company. Votualailai is a wholly owned subsidiary of ICF. It owns and operates the Naviti Beach Resort on the Coral Coast of Viti Levu. The profitability of the resort is largely dependent upon the tourist trade from Australia. Reports in the local press, it is said,

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have resulted in unfavourable comment among tour operators, who may now have misgivings about the wisdom of making bookings at Naviti on behalf of their clients. Furthermore the misleading reports in local newspapers have led to inquiries being made to the management of the Naviti Resort about its ability to meet its financial commitments. It is claimed that this has interfered with the smooth running of the business. This is the second new factor upon which ICF relies in support of this application.

In Mr. Tosio's affidavit sworn on the 20th October, he states that the accounts of ICF for the 31st December 1983 were prepared prior to the 19th September 1984. He goes on "they have now been submitted to our auditors Coopers & Lybrand for audit". Nothing is said as to when exactly these accounts were prepared or as to why they could not have been audited and placed before this Court at the hearing of the application for the appointment of the interim liquidator. It follows that ICF has not shown that this evidence could not have been made available at the proper time. The audited accounts themselves indicate that ICF made a net loss of $62,204 in the year ended 31st December 1983.

In regard to Votualailai, the financial position of that company was material to a consideration of the appointment of an interim liquidator for ICF. The shares in Votualailai constitute the main asset of ICF. No calculation as to the value of these shares was placed before the Court at any time. The audited account of Votualailai as at the 31st December 1983, which were not available earlier, show that the subsidiary made, an operating loss for the year of $292,925 notwithstanding a gross profit on accommodation etc of nearly two million dollars. Up to the 30th June this year, Votualailai incurred a further loss of $43,380. None of this suggests that there has been any significant turn around in the fortunes of Votualailai. The position remains that there is no evidence that Votualailai is presently making profits sufficient to meet its own liabilities and to contribute to the profitability of ICF. There has been no significant change of circumstances which would warrant a discharge of the order made on the 1st October.

On the 2nd October, the "Fiji Times" reported the decision made by me on the 1st October. While it cannot be said that the text of that report is either unbalanced or unfair, the heading of the

article namely "RECEIVER FOR RESORT Co. - COURT ORDER" was misleading. It gave the impression that a receiver had been appointed in respect of Votualailai which was not the case.

On the 24th October the "Fiji Times" reported "VOTUALAILAI LIMITED IS UNDER RECEIVERSHIP". This was not the truth. I concede that these reports must have caused embarrassment to the managers of the Naviti Beach Resort and concern among trade creditors and suppliers.

It is almost inevitable that winding up or bankruptcy proceedings, will give rise to adverse comments and that if given press publicity, damage may follow. There is nothing new in this and ICF must have been aware from the very beginning that the appointment of an interim receiver might bring about undesirable consequences to its subsidiary Votualaiali. This was apprehended by Mr. Boris Ganke who made specific mention of it in paragraph 7 of the telex dated 26th August 1984 attached to the affidavit of Mr. D.C. Maharaj sworn on the 28th August. Thus this Court, before it made its decision on the 1st October, was made aware of the possibility that an order in respect of ICF might have a detrimental effect upon Votualailai. It cannot be said, therefore, that there has been any change of circumstances since the making of the order which requires this Court to review the position.

In any event, Votualailai is entitled to defend itself against false reports in the press and may take such steps as may be deemed necessary to undo any damage caused to its reputation. It is in no ones interest that the business of Votualailai should fail as the shares in that company represent a tangible asset which if sold might well resolve the financial difficulties of ICF. It is for this reason that I have declined to accept an undertaking offered to the Court by the directors of ICF that they will not sell the shares of Votualailai. The acceptance of such an undertaking might not be in the best interests of ICF.

In the course of his submissions, Mr. Hamilton for ICF said that the application before the Court should be regarded as one made under section 239(1) of the Companies Act 1983 which reads

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"A liquidator appointed by the court may resign
or, on cause shown, be removed by the court".

The application (as amended) is not very happily worded. It makes no mention of section 239(1) of the Act, nor of the removal of the interim liquidator. However, even if the application could be considered as one to remove a liquidator for cause shown, I do not think it would be an appropriate course to follow.

It seems clear to me on the authority of In Re Adam Eyton Ltd; Ex parte Charlesworth (1887) 36 Ch D 299 that the due cause is to be measured by reference to the real, substantial, honest interests of the liquidation, and to the purpose for which the liquidator is appointed.

That is a matter quite distinct from a consideration as to whether the liquidation (in this case the provisional liquidation) should have commenced at all. I would not be disposed to follow the decision of Needham J in Shaw v. Bambos Holdings Pty. Ltd. (1984) 1 ACLC where a provisional liquidator was removed from office under the corresponding section 373(1) of the Companies (New South Wales) Code. The effect of the order was to remove the company from provisional liquidation. Needham J acted in the interests of the company itself and not of the liquidation. He cited no authority to support his action.

In an unreported case decided on the 22 October 1984 in the New South Wales Equity Division, (Garden Mews-St. Leonards Pty. Ltd. v. Butler Follnow Pty. Ltd.) McLelland, J. did something similar. However, it is not clear if the learned Judge was acting in terms of section 373(1) of the local statute. But, if that was the case he did not refer to any authority.

As an alternative to the discharge of the provisional liquidation order, the applicant seeks its variation. It wishes to reduce the Official Receiver's role to that of a mere custodian of the assets of ICF. It has been submitted that the Official Receiver is not in a position to manage the affairs of either ICF or Votualailai any better then the present directors. As the audited

accounts of ICF and Votualailai Ltd have now been produced, it is said that the orders which require the interim liquidator to obtain them have been satisfied.

ICF itself is primarily an investment company and it does not carry on a trade or business as such which would require active participation by the Official Receiver or his agents. The directors have been left in charge of the company, but, the intention is that the official receiver shall be kept informed as to their activities. As for Votualailai, the Official Receiver is given the rights of a shareholder only. It is not contemplated that he shall have power to dispose of any of the shares without the sanction of the Court.

I shall vary the terms of clause (4) of the order made on the 1st October to remove any doubt which may exist on that score by adding to the paragraph the words

> "provided that the Official Receiver shall not sell, transfer or change any such shares without the consent of this Court".

It is conceivable that an offer may be made to purchase the assets of ICF including the shares in Votualailai while ICF remains under the control of the Official Receiver and it may be in the interests of ICF and its creditors that any such offer be accepted.

Clauses (5) & (6) of the order under review reflect the situation which existed at that time. There is no need to change them and they and all other matters set out in the said order shall remain in full force and effect. This application must be dismissed except to the limited extent to which the order is varied as recited above. I order that the Official Receiver shall have his costs in any event. His costs are to be paid in the first instance by ICF immediately upon taxation.

In regard to the costs of the other interested parties I shall make a provisional order that these be costs in the cause. In the event that ICF is successful in defeating the petition, all costs will have to be borne by Offshore. However, it was in my view imprudent for the directors of ICF to resolve to make this application in the face of the order made by this Court on the 1st October, even though

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at the time of the directors meeting that order had not been drawn up. If a winding up order is made against ICF, the question may arise as to whether the cost of these proceedings should be borne in whole or in part by the directors of ICF who supported the resolution to make this application.

I shall leave it open to the Official Receiver or the liquidator or the petitioner creditor to apply, if they think fit, for a special order as to the costs of this application on notice to any party likely to be affected thereby. This reservation is not to be regarded as an indication that this Court could or would make such an order.

By costs of these proceedings, I mean not only the costs incurred by Offshore in resisting the application, but, I include costs incurred on behalf of ICF by the directors or any one or more of them in prosecuting the application.

F.X. Rooney
JUDGE

SUVA

28TH NOVEMBER 1984.